SUPREME COURT, U. S.

No. 73-1107

In the Supreme Court of the United States

OCTOBER TERM, 1973

BERNARD ROSEN, EXECUTIVE DIRECTOR, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

ROBERT G. VAUGHN

JAMES A. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

GILBERT A. CUNEO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Executive Director of the United States Civil Service Commission and the Secretary of Defense, *et al.*, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinions of the court of appeals (Apps. A and B, *infra*, pp. 1a–18a, 19a–33a) are reported at 484 F.2d 820

and 484 F.2d 1086. There was no opinion of the district court in *Vaughn* v. *Rosen* (See App. C, *infra*, p. 34a). The opinion of the district court in *Cuneo* v. *Schlesinger* (App. D, *infra*, pp. 35a–38a) is reported as *Cuneo* v. *Laird* at 338 F. Supp. 504.

JURISDICTION

The judgment of the court of appeals in *Vaughn* v. *Rosen* (App. E, *infra*, p. 39a) was entered on August 20, 1973, and in *Cuneo* v. *Schlesinger* (App. F, *infra*, p. 40a) on September 5, 1973. Petitions for rehearing and suggestion of rehearing *en banc* were denied on October 16 and 18, 1973 (Apps. G and H, *infra*, pp. 41a, 42a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals improperly imposed detailed requirements governing the manner in which the government must satisfy its burden of proof that materials sought under the Freedom of Information Act are exempt from disclosure.

2. Whether the court of appeals improperly approved the use of special masters in Freedom of Information Act cases.

STATUTE INVOLVED

The Freedom of Information Act, as amended, 5 U.S.C. 552, is reprinted as Appendix I, *infra*, pp. 43a–46a.

STATEMENT

1. In *Vaughn* v. *Rosen*, the plaintiff instituted suit pursuant to the Freedom of Information Act, 5 U.S.C.

552, to obtain disclosure of "Evaluation of Personnel Management" reports, as well as reports and studies of a similar nature prepared by the Bureau of Personnel Management of the Civil Service Commission for fiscal years 1969 through 1972 (App. A, *infra*, p. 5a). These documents, according to the affidavit of the Director of the Bureau of Personnel Management, are "statements of the Commission's evaluation of the way managers and supervisors of federal agencies are carrying out their personnel management responsibilities; they are directed to installation heads and to higher echelons of Federal agencies as an analysis of how we see personnel management being carried out at the field establishment level and on an overall agency basis" (V.J.A. 15).[1] The reports contain data on cases involving individual employees identified by name; they describe serious personnel management problems; and they contain recommendations on how agencies may deal with their problems (V.J.A. 10–16).

The Director explained that "it is because of the degree of confidentiality we have accorded these documents that agencies have been forthright and candid and have voluntarily exposed to us problems they might readily have shielded from us and have permitted free access to personnel and files and records of every description thereby making it possible for us to make meaningful evaluations of the personnel management in the agencies" (V.J.A. 13).

While plaintiff stated that he did "not accept the [Government's] characterization of the documents"

[1] "V.J.A." refers to the Joint Appendix filed by the parties in the court of appeals in *Vaughn* v. *Rosen*.

(V.J.A. 24), his own motion papers described the documents in similar terms and attached an article written by the Director, which comprehensively outlined the agency's program for personnel management evaluation (V.J.A. 24–30).

After both sides moved for summary judgment, the district court granted the government's motion without explanation and without *in camera* inspection of the documents (App. C, *infra*, p. 34a).

The court of appeals reversed. The court did not discuss the parties' conflicting legal interpretations of the three exemptions from disclosure under the Act that are involved in this litigation—exemptions 2,[2] 5,[3] and 6[4]—the only points which the parties had briefed and argued. Instead, the court discussed the difficulties generally experienced by plaintiffs in Information Act cases in disputing the government's factual contentions concerning the nature of the documents at issue (App. A, *infra*, pp. 7a–8a). The opinion also discussed the problems generally experienced by trial judges in attempting to evaluate the government's factual contentions through *in camera* inspection, including the burden involved in examining a large number of documents in detail and the necessity of conducting such an examination without benefit of criticism and illumination by the plaintiff, the party with the greatest interest in

[2] Exemption 2 applies to matters that are "related solely to the internal personnel rules and practices of an agency."

[3] Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[4] Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

forcing disclosure (App. A, *infra*, pp. 10a–11a). The court also discussed the problems experienced by the courts of appeals in reviewing decisions of trial courts in Information Act cases because trial courts often state their decisions in conclusory terms and courts of appeals are often required to commit substantial judicial manpower to examination of the documents, again without benefit of the plaintiff's views (App. A, *infra*, p. 11a). The opinion also refers to "governmental obfuscation and mischaracterization" and to the governmental "tactical ploy" of automatically claming "the broadest possible grounds for exemption for the greatest amount of information" (App. A, *infra*, p. 13a).

To alleviate these general problems, the panel "elaborated" upon *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, and set forth the following procedures to be applied by the district judge upon remand and, apparently, by district judges in future Information Act cases in the Circuit:

> 1. The agency will be required to set forth a description of the documents in detailed form in manageable segments.
>
> 2. The agency will specify in detail which portions of the documents in question are exempt by means of a system of itemizing and indexing, including a subdivision of the documents into manageable parts which are to be cross-referenced to the agency's justification.
>
> 3. "Opposing counsel should consult [in the preparation of the index] with a view toward eliminating from consideration those portions [of the documents] that are not controverted and narrowing the scope of the court's inquiry."

4. The district court may rule separately on each element of the itemized list of documents and portions of documents.

5. If examination of the documents is "extremely burdensome" to the district court, it may appoint a Special Master.

(App. A, *infra*, pp. 13a–17a).

2. In *Cuneo* v. *Schlesinger*, plaintiffs sought to compel release of the non-public portions of the Defense Contract Audit Manual, a manual prepared by the Defense Contract Audit Agency (DCAA) in the Department of Defense. The DCAA was established by the Secretary of Defense for the purpose of providing advisory audit services to government contracting officers in their conduct of contract administration for the government. DCAA acts in an advisory capacity to government contracting officers and undertakes to verify for them, from "an examination of Government contractors' books and records, that the costs incurred in the performance of contracts comply with the Armed Services Procurement Regulations ['ASPR'] establishing the criteria pursuant to which the Government allows or disallows contract costs" (C.J.A. 73).[5]

In view of the large number of government contracts and the great volume of contracts in different stages of performance, the DCAA must be, of necessity, extremely selective in conducting audits and must limit itself to scrutiny of only a small portion of the various matters which could be audited. The Defense

[5] "C.J.A." refers to the Joint Appendix filed by the parties in the court of appeals in *Cuneo* v. *Laird*.

Contract Audit Manual ("Manual") was designed to provide DCAA auditors with guidance in performing effective auditing in a selective manner. The non-public portions of the Manual, which the plaintiffs sought in the case, provide "uniform guidance and instructions concerning the criteria to be used in deciding what must be audited, how it shall be audited, what is to be the depth of the examination, what the frequency of audit shall be, and how to determine the extent of reliance which may be placed on the contractor's own internal controls" (C.J.A. 74–75).

The government contended below that the non-public portions of the Manual were exempt from disclosure pursuant to exemptions 2 and 5 in that their disclosure would apprise contractors of DCAA audit procedures and thereby enable them to claim charges which were improper under the ASPR. After an *in camera* inspection, the district court upheld the government's contentions (App. D, *infra,* p. 35a). The court found that "[t]o require the Government to make public to Defense Contractors the non-public portions of the Contract Audit Manual would be comparable to requiring one football team to give its 'play-book' to the opposing team before a game" (App. D, *infra,* p. 37a) and might enable unscrupulous contractors to "take steps that might well result in bilking the Government, and hence the taxpayers, of hundreds of millions of dollars on Defense Contracts" (App. D, *infra,* p. 38a). Accordingly, the district court granted the government's motion for summary judgment.

On appeal, the government reiterated its contention that the non-public portions of the Manual were

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exempt from disclosure pursuant to exemptions 2[6] and 5[7]. At oral argument, the plaintiffs abandoned their attempt to compel disclosure of the entire non-public portions of the Manual and sought only those portions that allegedly constituted "secret law," *i.e.*, rules which affected substantive rights and liabilities. The government relied upon the affidavit of the Director of the DCAA which explained why the non-public portions of the Manual do "not embody Agency interpretations determinative of the rights of any party in his dealing with the Government" (C.J.A. 76–83, 86).

The court of appeals reversed and remanded the case to the district court to determine whether the Manual contained "secret law" and, if so, to order the portions containing this "law" disclosed to the plaintiffs. The court reiterated the discussion in *Vaughn* of the difficulties experienced by plaintiffs in Information Act cases in disputing the factual contentions of the government and the burdens imposed upon district judges by the need for *in camera* inspection of frequently voluminous documents without the benefit of the plaintiff's views and upon courts of appeals in reviewing district court decisions (App. B, *infra*, pp. 29a–31a).

In its instructions to the district court, the court again set forth the procedures to be followed in Information Act cases as announced in *Vaughn*. Specifically, the court required the government to provide a "particularized and specific" justification for exemption; to index the non-public portions of the

[6] See note 2, *supra*.

[7] See note 3, *supra*.

Manual; and to cross-reference the index to the justification. The court also repeated the instruction in *Vaughn* that counsel for the plaintiffs should consult with government counsel in the preparation of the index and that the district court should rule separately on each item of the government's itemized index. Finally, noting that *Vaughn* had approved the appointment of a special master in Information Act cases, the court approved the practice if the district court deemed it appropriate (App. B, *infra*, pp. 31a–33a).

REASONS FOR GRANTING THE WRIT

1. The court of appeals has improperly, and without argument on the point, promulgated procedures which prescribe in detail the manner in which the government is to prove its right to exemptions under the Freedom of Information Act. Because more than half of all Freedom of Information Act cases (49 of the 82 pending on Nov. 1, 1973) are brought in the District of Columbia, these procedures now constitute a dominant gloss on the statute itself. Contrary to the decision of this Court in *Environmental Protection Agency* v. *Mink, supra,* which recognized that the circumstances of each case should determine the appropriate procedure for the resolution of the issues presented, the court of appeals has imposed upon the government a specific and rigid procedure for Freedom of Information Act cases generally.

The fallacy of the approach taken by the court of appeals is illustrated by the records in these cases. In the first case, *Vaughn* v. *Rosen,* the government filed

an affidavit relying on three different exemptions. The plaintiff filed additional material describing the nature of the documents sought. The trial court granted summary judgment to the government on the basis of this evidence without an *in camera* inspection. (In *Mink* this Court specifically recognized that *in camera* inspection is not required in every case, 410 U.S. at 93). Without ruling that the government had failed to present sufficient evidence to support the district court's finding that the documents are exempt, the court of appeals reversed because the government had not undertaken to prove its case in accordance with the procedures announced in the opinion.

The court of appeals applied its new directives in *Cuneo*. There the government had filed an extensive affidavit which explained in detail the nature of the materials sought and the reason why they should be kept confidential. The district court made an *in camera* inspection of the documents and then wrote an opinion explaining why the materials are exempt. The court of appeals did not hold that the government had not proved its case, but was troubled because the district court had made no specific finding that the documents contained no "secret law." If the court of appeals was not convinced that the government's affidavit established that the materials contained no secret law, it could have itself examined the documents *in camera*. The court, however, reversed because the government had not followed the then recently promulgated procedures announced in *Vaughn*.

As the court of appeals recognized (App. A, *infra*, p. 17a), the procedures it has required will impose "a sub-

stantial burden" on the government in the trial of Freedom of Information Act cases. It will also deprive the government of the opportunity to determine the most effective manner in which to organize and present its case in light of the nature of the materials involved, the nature of the legal issues, and the governmental interests at stake. The government as litigant, like the courts, also has "burdens" which place demands on its limited resources. If, in a particular case, the government has failed to carry its burden of proof to establish an exemption, the courts should so hold. The procedures of the court of appeals, however, attempt to control the way in which the government should conduct its litigation.

In *Environmental Protection Agency* v. *Mink, supra,* this Court recognized that the method of proof in a Freedom of Information Act case cannot be so complex and so burdensome that compliance would necessitate either public disclosure of the documents or a disproportionate investment of governmental or judicial resources. Accordingly, as part of a "workable balance" which the Court struck between the Act's mandate of the fullest possible disclosure of governmental activity and the need to preserve the ability of government to function effectively, the Court held that the government could establish a claim of exemption by means of detailed affidavits, oral testimony and surrounding circumstances. The Court also held that a court need not inspect the documents at issue *in camera* in every case and that, even in those cases in which such an inspection is viewed as necessary, a court may inspect a representative sample

rather than each and every document. The Court thus preserved both the ability of the government to claim an exemption from compelled disclosure in Information Act litigation and the right of a plaintiff to judicial evaluation of the government's claim without imposing an undue burden upon either the government or the courts. In these two cases, without argument on the point, the court of appeals has disturbed the balance drawn in *Mink*.

2. The court of appeals' ruling that the district court may use a special master to examine the documents *in camera* is contrary to the statute and the rule of this Court that reference to a special master shall be the exception. Fed. R. Civ. P. 53(b); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249. In *La Buy*, this Court emphasized that Rule 53 does not authorize "an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation" (352 U.S. at 256). The Court specifically held that Rule 53(b) does not authorize appointment of a special master because the case is " 'very complicated and complex,' " it would " 'take considerable time to try' " and the court's calendar is " 'congested.' " 352 U.S. at 254.

The use of a special master in a Freedom of Information Act case is also improper because in any such case the government is contending that the documents in question should not be made public because of a congressionally recognized public interest in their confidentiality. This Court, in *Mink*, recognized that the *in camera* procedure is a device which enables the courts to carry out their congressionally created duty to

determine whether or not the documents in issue are exempt without jeopardizing the confidentiality of the documents. But it is one thing to sanction *in camera* inspection by an Article III judge, appointed by the President, confirmed by the Senate, and required by law to devote his time to his judicial duties. It is quite another to sanction *in camera* inspection by a special master, who is ordinarily appointed by the court for a particular case, and is subject to no such selection process and no such constraints.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys.

JANUARY 1974.

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1039

ROBERT G. VAUGHN, APPELLANT

v.

BERNARD ROSEN, EXECUTIVE DIRECTOR, UNITED STATES CIVIL SERVICE COMMISSION, ET AL

Appeal from the United States District Court for the District of Columbia

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Argued 7 June 1973

Decided 20 August 1973

Ronald L. Plesser, with whom *Alan B. Morrison* was on the brief, for appellant.

John C. Lenahan, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry*, and *Derek I. Meier*, Assistant United States Attorneys, were on the brief, for appellees.

Before: ROBINSON and WILKEY, *Circuit Judges*, and FRANK A. KAUFMAN,* *United States District Judge* for the District of Maryland.

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*Sitting by designation pursuant to 28 U.S.C. § 292(c)

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Opinion for the Court filed by Circuit Judge Wilkey.

WILKEY, *Circuit Judge:* Appellant sought disclosure under the Freedom of Information Act[1] of various government

[1] "5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public–

"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

"(B) statements of the general course and methods by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying–

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

documents, purportedly evaluations of certain agencies' personnel management programs. The District Court denied

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"(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

"(i) it has been indexed and either made available or published as provided by this paragraph; or

"(ii) the party has actual and timely notice of the terms thereof.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this papagraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

disclosure, presumably on the ground the documents fell within one or more exemptions to the FOIA.[2] The scant record makes it impossible to determine if the information sought by appellant is indeed exempt from disclosure; we

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"(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

"(b) This section does not apply to matters that are–

"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commerical or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells.

"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

[2] The trial court below granted appellee's motion for summary judgment without giving any reasons for its action. We do not, therefore, know why the District Court found the documents to be exempt from disclosure.

must remand the case to the trial court for further proceedings.

I. *Facts*

Overall responsibility to evaluate, oversee, and regulate the personnel management activities of the various federal agencies rests with the Civil Service Commission.[3] The Bureau of Personnel Management, the arm of the Civil Service Commission for this task, works with the agencies in evaluating their personnel management programs. After each evaluation is complete, the Bureau issues a report entitled Evaluation of Personnel Management. These evaluations assess the personnel policies of a particular agency and set forth recommendations and policies customarily adopted by both agencies and Commission.[4] Appellant, a law professor doing research into the Civil Service Commission, sought disclosure of these evaluations and certain other special reports of the Bureau of Personnel Management.[5]

The Director of the Bureau of Personnel Management Evaluation declined to release the documents sought.[6] This refusal to disclose was sustained by the Executive Director of the Civil Service Commission, who asserted that the

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[3] *See* Exec. Order 9830 (24 Feb. 1947).

[4] The documents under discussion are not a part of the record on appeal; the court does not, therefore, know precisely what is contained in the evaluations. Both parties, however, seem to agree that the general nature of the documents is as we have described them in the text. We may, therefore, accept this description for purposes of our discussion.

[5] The documents other than the evaluations were described as "special studies of the Commission for fiscal years 1969-72." The exact nature of these "special studies" does not appear from the record, but it appears that they deal with the same general issues as do the evaluations.

[6] Letter of Gilbert A. Schulkind (15 June 1972) (Joint App. at 15)

information was exempt from disclosure because it (1) related solely to the internal rules and practices of an agency;[7] (2) constituted inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;[8] and (3) was composed of personal and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[9]

After this refusal appellant filed this action in the District Court, seeking injunctive relief and an order requiring disclosure of the requested materials in accordance with 5 U.S.C. § 552(a)(3) (1970). The Government filed a motion to dismiss, or in the alternative for summary judgment, in which it was contended that the reports fell within the three exemptions given above.

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[7] The FOIA provides that

> this section does not apply to matters that are
>
> ....
>
> related solely to the internal personnel rules and practices of an agency ....

5 U.S.C. § 552(b)(2) (1970).

[8] The FOIA provides that

> This section does not apply to matters that are
>
> ....
>
> inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. § 552(b)(5) (1970).

[9] The FOIA provides that

> This section does not apply to matters that are
>
> ....
>
> personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(6) (1970).

Aside from legal arguments, the sole support, regarding the contents of the documents and their exemption, of the Government's motion was an affidavit of the Director of the Bureau of Personnel Management Evaluation. This affidavit did not illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the Director's opinion that the evaulations were not subject to disclosure under the FOIA. On the basis of this affidavit, the trial court granted the Government's motion for summary judgment. This appeal followed.

II. *Problems of Procedure and Proof under the Freedom of Information Act*

The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself.[10] This court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act.[11] By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions to the

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[10] *See* footnote 1, *supra.*

[11] "The Legislative plan creates a liberal disclosure requirement limited only by specific exemptions, which are to be narrowly construed." *Getman* v. *NLRB*, 146 U.S. App. D.C. 209, 211, 450 F.2d 670, 672, *stay denied*, 404 U.S. 1204 (1971). *See also Bristol Myers* v. *FTC*, 138 U.S. App. D.C. 22, 25, 424 F.2d 935, 938, *cert. denied*, 400 U.S. 824 (1970); *M. A. Shapiro & Co.* v. *SEC*, 339 F. Supp. 467, 469 (D.D.C. 1972).

FOIA.[12] Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure.

In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation. Here the Government contends that the documents contain information of a personal nature, the disclosure of which would constitute an invasion of certain individuals' privacy. This factual characterization may or may not be accurate. It is clear, however, that appellant cannot state that, as a matter of his knowledge, this characterization is untrue. Neither can he determine if the personal items, assuming they exist, are so inextricably bound up in the bulk of the documents that they cannot be separated out. The best appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information.

EPA v. *Mink*[13] differentiates between the action by the trial court called for when the factual nature of the disputed

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[12] *See* 5 U.S.C. § 552(a)(3) (1970).

[13] 410 U.S. 73 (1973).

information is known and when it is not known. The first portion of the Supreme Court's decision dealt with documents the factual nature of which was not disputed; all parties agreed that the documents had been classified as "secret" by the President. The first exemption under the FOIA provides that documents which are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," are exempt from disclosure.[14] Since the factual nature of the documents was undisputed and since under this undisputed description of the documents they clearly fit within the exemption, the Court held that no further inquiry or argument was permitted; they need not be revealed.

A second group of documents considered by the Court in *Mink* had not been classified "secret." They were claimed to be exempt as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[15] There was, however, a *factual* dispute regarding whether the documents actually fit this description. The Court concluded that, while material dealing with facts contained in such memoranda could be disclosed, memoranda dealing with law or policy were exempt. There was a still further *factual* dispute regarding how much of the material was factual, how much law or policy, and how much a combination of the two. With regard to this material which did not fit squarely within the language of the exemption, the Court remanded to the trial court to make a determination regarding the actual composition of the material.

The disputed information in this case is analogous to the second group of documents considered in *Mink*, in that on

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[14] 5 U.S.C. § 552(b)(1) (1970).

[15] 5 U.S.C. § 552(b)(5) (1970).

the record facts they do not indisputably fit within one of the exemptions to the FOIA. If the factual nature of the documents were so clearly established on the record, then the court would inquire no further and would make the legal ruling as to whether they fit within the defined exemption or exemptions. In this situation, in which there is a dispute regarding the nature of the information, the Supreme Court in *Mink* provided the outline of how trial courts should approach the job of making this factual determination.[16] Our discussion here is intended to be an elaboration of this outline.

This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job

[16] In *EPA* v. *Mink*, 410 U.S. 73, 92-93 (1970), the Supreme Court provided guidance for the trial court regarding when it should conduct an *in camera* examination. The Court made it clear that it was not always necessary for a court to conduct an *in camera* examination.

of illumination and characterization as would a party interested in the case.

The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to the Act. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously an appellate court is even less suited to making this inquiry than is a trial court.

Here we are told that certain documents fall under three exemptions which permit the agencies to decline disclosure.[17] We do not know precisely how voluminous this information is, but from the general descriptions provided it seems reasonable to conclude that the documents run to many hundreds of pages. We could test the accuracy of the trial court's characterizations by committing sufficient resources to the project, but the cost in terms of judicial manpower would be immense.

This burden is compounded by the fact that an entire document is not exempt merely because an isolated portion need not be disclosed.[18] Thus the agency may not sweep a

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[17] *See* footnotes 7-9, *supra.*

[18] This was made clear in *EPA* v. *Mink*, 410 U.S. 73, 85-94 (1970). *See also Sterling Drug* v. *FTC*, 146 U.S. App. D.C. 237, 243, 450 F.2d 698, 704 (1971).

document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information.[19] It is quite possible that part of a document should be kept secret while part should be disclosed. When the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information. Isolating what exemptions apply to what parts of a document makes the burden of evaluating allegations of exemption even more difficult.

Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible. The burden has been placed specifically by statute on the Government. Yet under existing procedures, the Government claims all it need do to fulfill its burden is to aver that the factual nature of the information is such that it falls under one of the exemptions. At this point the opposing party is comparatively helpless to controvert this characterization. If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation. This is clearly not what Congress had in mind.

In two definite ways the present method of resolving FOIA disputes actually *encourages* the Government to contend that large masses of information are exempt; when in fact part of the information should be disclosed.

First, there are no inherent incentives that would affirmatively spur government agencies to disclose

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[19] It may be, of course, that the exempt and the non-exempt portions are so inextricably intertwined that it is impossible to separate them. The issue of whether they are intertwined is, itself, a matter of fact which must be determined by the trial court as the trier of fact. *See EPA* v. *Mink*, 410 U.S. 73, 92 (1970).

information. Under current procedures government agencies *lose* very little by refusing to disclose documents. At most they will be put to a court test stacked in their favor, the burden of which can be easily shifted to another by simply averring that the information falls under one of several unfortunately imprecise exemptions. Conversely, there is little to be *gained* by making the disclosure. Indeed, from a bureaucratic standpoint, a general policy of revelation could cause positive harm, since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure.

Secondly, since the burden of determining the justifiability of a government claim of exemption currently falls on the court system, there is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information. Let the court decide! And the tactical ploy is, to the extent that the number of facts in dispute are increased, the efficiency of the court system involved in that dispute resolution will be decreased. If the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt. Thus, as a tactical matter, it is conceivable that an agency could gain an advantage by claiming overbroad exemptions.

The simple fact is that existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual

nature of disputed information. To possible ways of achieving this goal we now turn our attention.

III. *Procedures for Testing the Classification of Claims to Exemptions.*

A. *Detailed Justification*

The problem of assuring that allegations of exempt status are adequately justified is the most obvious and the most easily remedied flaw in current procedures. It may be corrected by assuring government agencies that courts will simply no longer accept conclusory and generalized allegations of exemptions,[20] such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments. An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be composed without excessive reference to the actual language of the document.[21]

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[20] This requirement is clearly mandated by the Supreme Court's language in *Mink:*

> An agency should be given the opportunity, by means of *detailed affidavits or oral testimony*, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material . . . [subject to disclosure].

EPA v. *Mink*, 410 U.S. 73, 93 (1970) (emphasis added).

[21] In *EPA* v. *Mink*, *ibid.*, the Supreme Court made the following relevant comment:

> [T]he Agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter.

B. *Specificity, Separation, and Indexing*

The need for adequate specificity is closely related to assuring a proper justification by the governmental agency. In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt. This could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document.[22]

In employing these techniques approved by the Court the agency should be careful that it does not discuss only the representative example while ignoring the bulk of the documents which may be disclosable. Such a course of action is not permissible under the Court's language in *Mink* and would lead to the undesirable result of sweeping disclosable material under a blanket allegation of exemption.

[22] In our opinion in *Sterling Drug, Inc.* v. *FTC*, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971), we remanded a FOIA case to the trial court because it was impossible to determine from the record if the trial court had considered whether all of the disputed information was exempt or whether part was exempt and part not. There we said:

> We must agree, however, that there is no indication in the opinion below that the judge considered the possibility of deleting portions of the documents. It may well be that making deletions would not change the character of these documents, since they appear to consist primarily of the thoughts and recommendation of the Commission and its staff. However, there may be appendices or statements of facts which are clearly subject to disclosure. *See* Soucie v. David, 145 U.S. App. D.C. 144 at 155; 448 F.2d 1067 at 1078 (1971). We must therefore remand the case so that the District Court judge can consider this possibility and state in his opinion that he has done so.

146 U.S. App. D.C. at 243, 450 F.2d at 704. This case is similar in that we have no way of determining the scope of the trial court's determination of exemption. From all that appears on the record, the trial judge's determination was that he found all information exempt under all three of the alleged exemptions. This inability to determine which exemptions apply to what portions of the information gives rise to the need for an adequate indexing system such as described above.

Such an indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification. Opposing counsel should consult with a view toward eliminating from consideration those portions that are not controverted and narrowing the scope of the court's inquiry. After the issues are focused, the District Judge may examine and rule on each element of the itemized list. When appealed, such an itemized ruling should be much more easily reviewed than would be the case if the government agency were permitted to make a generalized argument in favor of exemption.

The need for an itemized explanation by the Government is dramatically illustrated by this case. The Government claims that the documents, as a whole, are exempt under three distinct exemptions. From the record, we do not and cannot know whether a particular portion is, for example, allegedly exempt because it constitutes an unwarranted invasion of a person's privacy or because it is related solely to the internal rules and practices of an agency. While it is not impossible, it seems highly unlikely that a particular element of the information sought would be exempt under both exemptions. Even if isolated portions of the document are exempt under more than one exemption, it is preposterous to contend that all of the information is equally exempt under all of the alleged exemptions. It seems probable that some portions may fit under one exemption, while other segments fall under another, while still other segments are not exempt at all and should be disclosed. The itemization and indexing that we herein require should reflect this.

C. *Adequate Adversary Testing*

Given more adequate, or rather less conclusory, justification in the Government's legal claims, and more specificity by separating and indexing the assertedly exempt

documents themselves, a more adequate adversary testing will be produced. Respect for the enormous document-generating capacity of government agencies compels us to recognize that the raw material of an FOIA lawsuit may still be extremely burdensome to a trial court. In such cases, it is within the discretion of a trial court to designate a special master to examine documents and evaluate an agency's contention of exemption. This special master would not act as an advocate; he would, however, assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge.

IV. *Conclusion*

Upon remand the Government should undertake to justify in much less conclusory terms its assertion of exemption and to index the information in a manner consistent with Part III above. The trial judge may, if he deems it appropriate, appoint a special master to undertake an evaluation of the information.

The procedural requirements we have spelled out herein may impose a substantial burden on an agency seeking to avoid disclosure. Yet the current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution – for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.[23]

[23] In this regard, administrative agencies should consider the example set by government investigative agencies following the passage

For the reasons given, the case is remanded for further proceedings consistent with this opinion.

So Ordered.

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of the Jencks Act. 18 U.S.C. § 3500 (1970). Confronted with a Congressional mandate to disclose information relevant to the testimony of witnesses in criminal trials, investigative agencies adopted procedures that assured proper disclosure. Investigative reports were prepared in a form in which the portions to which defense counsel should have access were easily removed from the file and made available to the defense counsel. Other parts of the file were kept segregated and relatively few problems were encountered.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1328

GILBERT A. CUNEO, ET AL., Appellants

v.

JAMES A. SCHLESINGER,
SECRETARY OF DEFENSE, ET AL.,

Appeal from the United States District Court for the District of Columbia

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Argued 6 June 1973

Decided 5 September 1973

Robert L. Ackerly, with whom *Herbert L. Fenster* was on the brief for appellants.

William Kanter, Attorney, Department of Justice, with whom *Harold H. Titus, Jr.*, United States Attorney and *Walter H. Fleischer*, Attorney, Department of Justice, were on the brief, for appellees.

Before BAZELON, *Chief Judge*, ROBINSON and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

Concurring opinion filed by *Chief Judge* BAZELON at p.15.

WILKEY, *Circuit Judge:* Appellant sought to obtain disclosure under the Freedom of Information Act[1] of the

[1] "(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public –

"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

"(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(2) Each Agency in accordance with published rules, shall make available for public inspection and copying –

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

Defense Contract Audit Manual, a manual prepared by the Defense Contract Audit Agency in the Department of

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"(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if –

"(i) it has been indexed and either made available or published as provided by this paragraph; or

"(ii) the party has actual and timely notice of the terms thereof.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

Defense. On cross-motions for summary judgment, and after an *in camera* inspection, the District Court held that the portions of the Manual not available to the public were

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"(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

"(b) This section does not apply to matters that are –

"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells.

"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

5 U.S.C. § 552 (1970).

exempt from disclosure under exemptions two and five of the FOIA.[2] For lack of a detailed record essential to this type action, we are unable to determine if the information sought by appellant falls within one of the exemptions. We remand for further proceedings.

I. *Facts*

The Defense Contract Audit Agency was established to provide necessary audit services to government officers in contract administration. DCAA acts in an advisory capacity to the contracting officer, and verifies that the costs incurred in performing a contract for the Armed Services comply with criteria of the Armed Services Procurement Regulations by conducting an examination of government contractors' books and records. In view of the large number of government contractors and the great volume of contracts in different stages of performance, the DCAA must necessarily be selective and must limit its scrutiny to a relatively small portion of the books and records which could be audited. The Defense Contract Audit Agency Manual, first issued in its *current* form in 1965,[3] was designed to guide DCAA auditors in effective auditing in a selective manner.

Appellant alleges that the Manual, or parts of it, have regularly been made available to members of the public, including on occasion appellant's clients. Appellees do not dispute this but, rather, allege that these disclosures were

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[2] *Cuneo* v. *Laird*, 338 F. Supp. 504 (D.D.C. 1972).

[3] The Manual sought here was preceded by earlier editions that were readily available to the public. Portions of these earlier editions were separated into appendices to the current Manual; these appendices are available to the public.

never authorized.[4] In addition, a relatively complete description of the contents of the Manual, including quotations from it, has been published in a treatise on defense contract auditing.[5] Finally, the Manual is made available to certain non-federal agencies and foreign governments who deal with American contractors.[6] Thus, to at least some extent, the Manual has been made available to individuals outside the DCAA.

The Government argued before the trial court that the information in controversy was exempt because it was "(2) related solely to the internal personnel rules and practices of an agency"; constituted "(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; and/or was composed of "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[7] The trial court, after examining the Manual *in camera*, on motions for summary judgment held that it was a "playbook," or "game plan," i.e., tactics to be employed, and that this playbook was exempt from disclosure under categories (2) and (5).

On appeal appellant abandoned his efforts to obtain those portions of the Manual that constitute a mere playbook.[8] He redoubled his argument, however, that portions of the Manual

[4] Until 1967 the foreword to the Manual provided:

> While the Manual is not available for public distribution, there is no prohibition against showing portions to contractors or others, when such action would be mutually beneficial.

Joint App. at 54.

[5] P. Trueger, *Accounting Guide for Defense Contracts* (6th ed. 1971).

[6] Joint App. at 54, 104, 106 & 107.

[7] *See* note 1, *supra*.

[8] There was considerable confusion regarding precisely what appellant wanted to have disclosed. After questioning by this court during oral argument it became obvious that appellant was not asking

dealt with the allowability of costs. Such portions, according to appellant, constitute a form of substantive "secret law"

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for the Manual to be disclosed in its entirety. The following dialogue indicates the parameters of appellant's request for disclosure:

THE COURT: Are there any instructions available to the field auditors which you would agree you do not have access to?

APPELLANT: Well, as we have suggested in our brief, if there are such things as saying the time of the audit, or it is not necessary to audit, say, fringe benefits, then of course, that might be excluded, but to the extent that any of the principles of ASPR – ASPR has the force and effect of law, in accordance with several decisions of the Supreme Court – to the extent that this Manual refines ASPR and its application, it becomes secret law, because it is ASPR that we are bound by.

* * * *

THE COURT: How would you distinghish between what Judge Hart referred to as the "game plan" and the law?

APPELLANT: Well, to the extent that the Manual refines ASPR – which we believe it must because ASPR is very general and every agency has an audit manual refining the cost principles set forth in their regulations – that is law and that becomes secret law. To the extent that the Manual might say "conduct the audit at a certain hour during the day or pick out this account and not that account," we don't need that and I don't think the public is entitled to it. But, to the extent that there are refinements of cost principles, I think that is clearly secret law. That is not giving away the game plan; that is a refinement of regulations that have the force and effect of law.

* * * *

THE COURT: If we find some things in there that don't fall within your definition of secret law, and are outside those areas that you contended relate to costs of contracts audited, then perhaps those things should remain secret?

APPELLANT: I agree, I agree.

that must be disclosed under the FOIA. Appellant also argued that the disclosure of portions of the Manual to various individuals, other non-federal agencies and foreign governments, constituted a waiver of exemption as to those portions.

II. *The Nature of the Information Sought*

Before the trial court appellant was requesting the entire contents of the Manual. According to the Government, the non-public portions of the Manual provide "uniform guidance and instructions concerning the criteria to be used in deciding what must be audited, how it shall be audited, what is to be the depth of the examination, what the frequency of the audit shall be, and how to determine the extent of reliance which may be placed on the contractor's own internal controls."[9] In other words, the Manual is a mere "playbook" that tells auditors where to look in the mass of books and records confronting them, but does not provide substantive guidance or otherwise set standards for what costs will actually be allowed. If a contractor knows in advance the coverage, depth, and scope of an audit, the contractor may be able to claim improper costs in areas that will receive little or no scrutiny. Thus, the Government argues that, for an audit to be effective, the portion of the Manual on coverage, depth, and scope must be kept secret.

Appellant disputes as a matter of fact this characterization of the Manual's contents. As a matter of law appellant's primary theory originally was that the Manual was an "administrative staff manual . . . that affect[s] a member of the public."[10] The FOIA specifically requires that such "administrative staff manuals" be made available to the public.

[9] Joint App. at 74.

[10] 5 U.S.C. § 552(a)(2)(C) (1970).

In addition to his principal contention that the entire Manual be disclosed as being an "administrative staff manual," appellant advanced two subsidiary arguments that, if accepted, would require the disclosure of *portions* of the Manual. *First*, appellant contended that at least portions of the Manual set forth standards of interpretation of ASPR and guidelines for the allowability of costs; these portions were said to constitute a form of "secret law" that must be disclosed under the FOIA. *Secondly*, appellant claimed that portions of the Manual had been made available to various persons and entities outside the Federal Government, and that at least as to these disclosed portions, DCAA had waived any right it might have to keep them secret.

At oral argument appellant abandoned his request for the entire Manual and narrowed his efforts to seeking disclosure of the portions that constituted "secret law."[11] Due to this concession, we no longer have reason to consider whether the entire Manual must be disclosed under the requirement covering "administrative staff manuals."[12] By like token, we need not consider the argument that disclosure to certain individuals and entities constituted a waiver of any right to keep those portions secret. This is true because appellant has stated that he wants only those portions of the Manual which constitute "secret law." Since appellant has an undeniable right to obtain such law, it is irrelevant whether those portions may also be obtained under a theory of waiver. We therefore do not decide any waiver issue here.

There does not appear to be any disagreement between the parties regarding what the nature of the "secret law"

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[11] *See* note 8, *supra*.

[12] The scope of the "administrative staff manual" disclosure requirement has recently been considered by two other Circuits. *See Stokes* v. *Brennan*, No. 72-2946 (5th Cir., 3 Apr. 1973); *Hawkes* v. *IRS*, 467 F.2d 787 (6th Cir. 1972).

being sought actually is. The portions sought by appellant which the Government agrees should be made available if they actually exist, are those which either create or determine the extent of the substantive rights and liabilities of a person affected by those portions. Information that falls within this definition would include, for example, guidelines for what costs would be allowed under ASPR, and rules or interpretations dealing with other substantive laws. Appellant does not seek to obtain disclosure of those portions of the Manual that prescribe techniques to uncover the facts relevant to a particular contract. Nor is a right to disclosure claimed for procedures directing auditors to concentrate examination on certain elements of a contractor's records.

It is clear that if any portion of the Manual does consist of interpretations of rules and statutes or guidelines for allowability of costs, appellant has a right to obtain disclosure.[13] Indeed, this was conceded by government counsel during oral argument. The sole remaining issue is thus purely factual – whether the Manual does contain any "secret law".

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[13] It is well established that information which either creates or provides a way of determining the extent of substantive rights and liabilities constitutes a form of law that cannot be withheld from the public. *See Sterling Drug, Inc.* v. *FTC*, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971); *American Mail Line, Ltd.* v. *Gulick*, 133 U.S. App. D.C. 382, 411 F.2d 696 (1968). The FOIA by its explicit terms condemns "secret law" and requires that it be made public:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying –
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register . . .

5 U.S.C. § 552 (a) (A) & (B) (1970). *See generally* DAVIS, ADMINISTRATIVE LAW, § 3A.27 (1970 Supp.).

In the unsatisfactory manner in which these FOIA cases have been arising, we have no record before us containing the answer to this issue. The District Judge was confronted with appellant's original claim for total access to the Manual, opposed by the Government's claim to blanket exemption under three exceptions to disclosure. On cross-motions for summary judgment, after *in camera* examination of the several volumes constituting the Manual, the District Judge sustained the Government's overall non-disclosure position under exemptions (2) and (5). Counsel apparently made no discriminating analysis of how portions of the Manual might differ in their purpose, nature, and content, and thus be subject to different criteria of disclosure; understandably, the trial judge made none.

III. *Procedures Under the FOIA*

A. *Problems of Testing Disclosability of Allegedly Secret Information*

Recently in *Vaughn* v. *Rosen*[14] this court had occasion to discuss the problems inherent in implementing the FOIA. Despite the heavy emphasis in favor of disclosure[15] and the specific requirement that the *Government* shall have the burden of proving that information need not be revealed,[16] we noted in *Vaughn* that procedures most often used in FOIA

[14] No. 73-1039 (D.C. Cir., 20 Aug. 1973).

[15] "The Legislative plan creates a liberal disclosure requirement limited only by specific exemptions, which are to be narrowly construed." *Getman v. NLRB*, 146 U.S. App. D.C. 209, 211, 450 F.2d 670, 672, *stay denied*, 404 U.S. 1204 (1970). *See also, Bristol Myers v. FTC*, 138 U.S. App. D.C. 22, 25, 424 F.2d 935, 938, *cert. denied*, 400 U.S. 824 (1970); *M.A. Shapiro & Co. v. SEC*, 339 F. Supp. 467, 469 (D.D.C. 1972).

[16] 5 U.S.C. § 552(a)(3) (1970).

cases permit the Government very easily to avoid disclosure.[17] Since the party seeking disclosure does not know the contents of the information sought, he cannot argue as effectively that the documents sought are, for example, "secret law" to which he is entitled access. In contrast, the Government does have access to the information and with confidence can convincingly argue to the trial judge that the factual nature of the information is as the Government alleges.

As we noted in *Vaughn*, the burden of actually determining whether the information is as the Government describes it falls ultimately on the court system.[18] After the Government alleges that the documents in controversy do not contain material which must be disclosed, but on the other hand consist of information whose secrecy must be preserved, the very claim of secrecy, under the usual court procedures in vogue, means that the Government has substantially relieved itself of the burden of proving more. To preserve secrecy it is then up to the trial judge to wade through the mass of documents and determine whether the information must be disclosed. The party seeking disclosure is helpless to contradict the Government's description of the information or effectively to assist the trial judge.

In *Vaughn* we concluded that the ease with which the Government could carry its burden, and the difficulty that a trial judge faces in determining whether information should be disclosed, created intolerable problems. *First*, it encouraged agencies to argue for the widest possible exemption from disclosure for the greatest bulk of material. *Secondly*, it had a tendency to undermine the reliability of a trial judge's findings; a trial judge, without the aid of counsel seeking disclosure, cannot be expected to investigate and isolate the factual nature of individual documents in a mass of similar

[17] *Vaughn v. Rosen*, No. 73-1039, slip op. at 7-14 (D.C. Cir., 20 Aug. 1973).

[18] *Id.* at 10-12.

appearing material. *Thirdly*, because the points of factual dispute have not been isolated by the traditional forms of argumentation and adversary testing, a determination is virtually unreviewable on appeal. The case at bar we remand for additional proceedings which hopefully will rectify to some extent these flaws.

B. *Procedures Upon Remand*

1. As in *Vaughn v. Rosen*, we believe that the problems adverted to will be substantially ameliorated if the Government is required to provide particularized and specific justification for exempting information from disclosure. This justification must not consist of "conclusory and generalized allegations of exemptions, such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments."[19] It is particularly important that information which is in effect substantive law not be concealed beneath a mass of other material. Even when the law is closely intermingled with other data, we cannot conceive of a situation in which legal interpretations and guidelines could not be segregated from other material and isolated in a form which could be disclosed.

2. Upon remand the Government should correlate its reasons for claiming that the various portions of the Manual should not be disclosed with the relevant portions of the Manual.

> [A]n indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification. Opposing counsel should consult with a view toward eliminating from consideration those portions that are not controverted and narrowing the scope of the court's inquiry. After the issues are focused, the District Judge may examine and rule on each element of the itemized list.[20]

[19] *Id.* at 14.

[20] *Id.* at 16.

3. Finally, if the District Judge deems it appropriate, he may appoint a special master to examine the Manual, the Government's justification, and the indexing. This could, in some circumstances, relieve much of the burden of evaluating voluminous documents that currently falls on the trial judge.

IV. *Conclusion*

The case is remanded so that the Government may undertake to index and justify the Manual in a manner consistent with Part III of this opinion, and for the District Judge to rule thereon.

So Ordered.

BAZELON, *Chief Judge*, concurring: I agree entirely with Judge Wilkey's exposition of the impediments that have confronted courts in enforcing compliance with the mandate of openness in the Freedom of Information Act. These impediments derive, of course, from exactly the problem against which the Act was directed – the enthusiasm for secrecy that seems all too often epidemic in our Government. Courts are responsible under the Act for testing broad claims of exemption from disclosure, claims that information must remain secret, against the precise categories of necessary secrecy that Congress has defined. Yet the claim of exemption has, in the past, foreclosed adversary analysis of whether, in fact, exemption is warranted, presenting the grave danger that, despite the best efforts of the court, the claim alone might conclude the case. *See Sterling Drug, Inc. v. FTC*, 146 U.S. App. D.C. 237, 450 F.2d 698, 715-16 (1971) (Bazelon, C. J., concurring in part and dissenting in part).

I do not suppose, nor, I assume, does the Court, that the procedures we have mandated to govern the remands here and in *Vaughn* v. *Rosen* (Slip Opinion No. 73-1039, August 20, 1973) will completely dispose of the problem. They are, like much in the law, an experiment to be tried by experience. And experience may prove that additional steps or different approaches are called for. Nonetheless, I think that these procedures bear substantial promise of facilitating enforcement of the Act. I join in the opinion of the Court.

APPENDIX C

United States District Court for the District of Columbia

Civil Action No. 1753–72

ROBERT G. VAUGHN, PLAINTIFF

v.

BERNARD ROSEN, EXECUTIVE DIRECTOR, U.S. CIVIL SERVICE COMMISSION, DEFENDANT

ORDER

Upon consideration of defendants' motion to dismiss or, in the alternative, for summary judgment and the entire record herein, it is by the Court this 22nd day of December, 1972,

Ordered that defendants motion be and it hereby is granted; and it is further

Ordered that the action be and it hereby is dismissed.

J. H. PRATT,
United States District Judge.

[Filed December 22, 1972, James F. Davey, Clerk]

APPENDIX D

United States District Court, District of Columbia,
January 14, 1972

Civ. A. No. 1826–67

GILBER A. CUNEO ET AL., PLAINTIFFS

v.

MELVIN R. LAIRD ET AL., DEFENDANTS

Dispute between defense contractors and government over disclosability of material in government contract audit manual. On cross motions for summary judgment, and on defendants' motion to dismiss, the District Court, Hart, J., held that nonpublic portions of government contract audit manual, which set forth the criteria to be used in relation to deciding what should be audited, how it show be audited, the depth of the examination, the frequency of the audit, and the reliance that could be placed upon defense contractors' own internal controls, were exempt from disclosure to defense contractors.

Plaintiffs' motion denied, defendants' motion granted, defendants' motion to dismiss denied.

Nonpublic portions of government contract audit manual, which set forth the criteria to be used in relation to deciding what should be audited, how it should be audited, the depth of the examination, the frequency of the audit, and the reliance that could be placed upon defense contractors' own internal controls, were exempt from disclosure to defense contractors. 5 U.S.C.A. § 552(b) (2, 5).

Robert L. Ackerly, Sellers, Conner & Cuneo, Washington, D.C., for plaintiffs.

Jeffrey Axelrad, Atty., L. Patrick Gray, III, Asst. Atty. Gen. Harland F. Leathers, Atty., Civil Div., Dept. of Justice, Washington, D.C., for defendants.

OPINION

HART, District Judge.

This matter came on for consideration by the Court on cross-motions for Summary Judgment and on defendants' Motion to Dismiss. Upon consideration of said motions, with points and authorities in support thereof, and of oral arguments by counsel for the parties, and after examination of the 3-volume Contract Audit Manual (DCAAM–7640.1) of the Defense Contract Audit Agency of the Department of Defense, the Court finds as follows:

FINDINGS OF FACT

1. There is no dispute of any material fact between the parties;

2. Plaintiffs have duly requested, under 5 U.S.C. § 522, that defendants disclose to plaintiffs the entire contents of the Audit Manual mentioned above;

3. Certain portions of said Manual are available to the public and, therefore, readily available to plaintiffs. The defendants contend that the remaining portions of the Manual, that is the nonpublic portions, are "related solely to the internal personnel rules and practice of an agency" and, further, are "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" and are, therefore, exempt from disclosure pursuant to 5 U.S.C. § 522(b) (2) and (5).

4. The Defense Contract Audit Agency (hereafter DCAA) was established by the Department of Defense on June 9, 1965. DOD Directive 5105.36. The purpose and function of DCAA is to verify from an examination of Government contractors' books and records that the costs incurred in the performance of contracts comply with the Armed Services Procurement Regulations establishing the criteria pursuant to which the Government allows or disallows contract costs. DCAA, at any given time, is responsible to audit some 43,000 contracts involving $50,000,000,000. This work is done by more than 3,000 auditors.

In view of the number of contracts involved, it is not feasible, with the personnel available, to audit and verify, in detail, all charges to all contracts. Audits must be conducted on a selective basis.

DCAA has devised certain tests, approaches and examination procedures to insure accurate audits and to carry out its assigned mission without an item by item audit in every contract. These approaches and procedures are set forth in the non-public portions of the 3-volume Contract Audit Manual. The said Manual was prepared, and is kept up to date by changes from time to time, in order to provide uniform guidance and instructions to some 340 separate field audit offices concerning the criteria to be used in deciding what must be audited, how it shall be audited, what is to be the depth of the examination, what the frequency of audit shall be, and how to determine the extent of reliance which may be placed on the contractor's own internal controls.

5. To require the Government to make public to Defense Contractors the non-public portions of the Contract Audit Manual would be comparable to requiring one football team to give its "play-book" to the opposing team before a game.

With the knowledge of the procedure set forth in the non-public part of the Manual a defense contractor, whose complete honesty left something to be desired, could claim unallowable costs in areas likely to receive little attention, remove supporting data of a damaging nature in areas subject to scrutiny and, otherwise, take steps that might well result in bilking the Government, and hence the taxpayers, of hundreds of millions of dollars on Defense Contracts.

CONCLUSIONS OF LAW

1. The non-public portions of the 3-volume Contract Audit Manual (DCAAM 7640.1) are exempt from disclosure to plaintiffs under 5 U.S.C. § 552(b)(2) and 5 U.S.C. § 552(b)(5).

2. Plaintiffs' Motion for Summary Judgment must be denied. Defendants' Motion for Summary Judgment must be granted. Defendants' Motion to Dismiss must be denied.

Counsel will present an Order.

APPENDIX E

No. 73-1039

United States Court of Appeals for the District of Columbia Circuit

September Term, 1972—Civil Action 1753-72

ROBERT G. VAUGHN, APPELLANT

v.

BERNARD ROSEN, EXECUTIVE DIRECTOR, UNITED STATES CIVIL SERVICE COMMISSION, ET. AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: ROBINSON and WILKEY, Circuit Judges and FRANK A. KAUFMAN,* United States District Judge for the District of Maryland.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing it is

Ordered and Adjudged by this Court that this case is hereby remanded to the District Court in accord-

*Sitting by designation pursuant to 28 U.S.C. § 292(c)

ance with the opinion of this Court filed herein this date.

Per Curiam—For the Court:

HUGH E. KLINE,
Clerk.

By: ROBERT A. BONNER,
Chief-Deputy Clerk.

Date: August 20, 1973.

Opinion for the Court filed by Circuit Judge Wilkey.

APPENDIX F

No. 72-1328

United States Court of Appeals for the District of Columbia Circuit

September Term, 1972—Civil Action 1826-67

GILBERT A. CUNEO, ET AL., APPELLANTS

v.

JAMES A. SCHLESSINGER, SECRETARY OF DEFENSE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, ROBINSON and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is

Ordered and Adjudged by this Court that this case is hereby remanded to the District Court in accordance with the opinion of this Court filed herein this date.

Per Curiam—For the Court:

HUGH E. KLINE, *Clerk.*

Date: September 5, 1973.

Opinion for the Court filed by Circuit Judge Wilkey.

Concurring opinion filed by Chief Judge Bazelon.

APPENDIX G

No. 73-1039

United States Court of Appeals for the District of Columbia Circuit

September Term, 1973—Civil Action 1753-72

ROBERT G. VAUGHN, APPELLANT

v.

BERNARD ROSEN, EXECUTIVE DIRECTOR, UNITED STATES CIVIL SERVICE COMMISSION, ET AL.

Before: ROBINSON and WILKEY, Circuit Judges; and KAUFMAN,* United States District Judge for the District of Maryland.

ORDER

On consideration of appellees' petition for rehearing, it is

Ordered by the Court that appellees' aforesaid petition is denied.

Per Curiam—For the Court:

HUGH E. KLINE,
Clerk.

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*Sitting by designation pursuant to Title 28, U.S.C. § 292(d).

APPENDIX H

No. 72-1328

United States Court of Appeals for the District of Columbia Circuit

September Term, 1973—Civil Action 1826-67

GILBERT A. CUNEO, ET AL., APPELLANTS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, ET AL.

Before: BAZELON, Chief Judge; and ROBINSON and WILKEY, Circuit Judges.

ORDER

On consideration of appellees' petition for rehearing, it is

Ordered by the Court that appellees' aforesaid petition is denied.

Per Curiam—For the Court:

HUGH E. KLINE, *Clerk.*

APPENDIX I

The public information section to the Administrative Procedure Act, as amended, 5 U.S.C. 552, provides:

Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statments of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion,

statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complain[ant]. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, procedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspec-

tion a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

U.S. GOVERNMENT PRINTING OFFICE: 1974